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IN THE

Supreme Court of the United States

October Term, 1968

No. 409

LOS ANGELES HERALD EXAMINER, a Division of The Hearst Corporation, and THE SAN FRANCISCO EXAMINER, a Division of The Hearst Corporation,

Petitioners,

vs.

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMEN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMEN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS' UNION NO. 9; and LOS ANGELES PAPER HANDLERS' UNION NO. 3, appellants in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondents,

RALPH E. KENNEDY, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, appellee in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents,

RALPH E. KENNEDY, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, appellee in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, the Los Angeles Herald Examiner, Division of The Hearst Corporation, and the San Francisco Examiner, Division of The Hearst Corporation, pray that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 20, 1968, denying petitioners leave to intervene in appeal proceedings to review a temporary injunction issued by the United States District Court for the

Northern District of California under Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C. §160(1).

OPINIONS BELOW.

The Court of Appeals' order of May 20, 1968 denying petitioners leave to intervene, rescinded a previous order of April 19, 1968 which had granted leave to intervene. Neither of these orders was accompanied by an opinion of the court. The orders are printed in Appendix A hereto.

The order, supplemental order, and findings of fact and conclusions of law issued by the District Court in connection with the temporary injunction have not been published and are printed in Appendix B hereto.

JURISDICTION.

The order of the Court of Appeals denying the petitioners leave to intervene was entered on May 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).*

QUESTION PRESENTED.

Where a district court, in proceedings instituted by the National Labor Relations Board pursuant to §10 of the National Labor Relations Act, as amended, issues a temporary injunction against a charged party, and the charged party appeals therefrom, may the charging party be denied the right to intervene in the appeal proceedings wherein the propriety of protecting his rights and interests by injunctive relief will be determined?

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*In *Local 283, UAW v. Scofield*, 382 U.S. 205, 208-09 (1965), the Court held that a charging party denied intervention in court of appeals proceedings to review a Board decision was a "party" to the case within the meaning of §1254(1).

STATUTE INVOLVED.

Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C. §160(1), provides in relevant part:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title . . . the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . . . Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony. . . ."

STATEMENT OF THE CASE.

This case originated from charges filed with the Board by petitioners herein, alleging that the respondent unions had engaged in and were engaging in unfair labor practices within the meaning of §8(b)(4)(i)(ii)(B) of the Act, 29 U.S.C. §158(b)(4)(i)(ii)(B), which proscribes secondary boycotts by unions. After conducting a preliminary investigation, as required by §10(1) of the Act, Respondent Ralph E. Kennedy, Regional Director of the Board, concluded that there was reasonable cause to believe that respondent unions were engaging in unfair labor practices, as charged, and that an unfair labor practice complaint should issue. Thereupon, pursuant to §10(1), Kennedy filed a petition in the District Court, seeking a temporary injunction interlocutory to the final adjudication of the matter by the Board. A hearing on an order to show cause was held, during which the charging parties, petitioners herein, were allowed to participate as provided by §10(1). After presentation of evidence, the District Court issued an order and supplemental order, accompanied by findings of fact and conclusions of law, granting the temporary injunction. Respondent unions appealed to the Court of Appeals and petitioners petitioned for leave to intervene in the appeal proceedings before that court.

By an order issued April 19, 1968, the Court of Appeals granted petitioners leave to intervene. Respondents thereafter filed with the Court of Appeals a motion to reconsider the order allowing intervention, and in response thereto the Court of Appeals issued a second order on May 20, 1968, rescinding its prior order but

providing that petitioners might appear and file a brief as *amici curiae.*

Petitioners applied to the Court of Appeals for an order staying further proceedings in that court pending final determination by this Court of the within petition for certiorari, but the Court of Appeals denied said application by an order dated July 16, 1968.

REASONS FOR GRANTING THE WRIT.

1. The order of the Court of Appeals denying petitioners leave to intervene in the review proceedings before that court is directly in conflict with the controlling decision of this Court in *Local 283, UAW v. Scofield*, 382 U.S. 205 (1965).

In *Scofield,* this Court reviewed two cases in which courts of appeals had issued orders denying petitions for intervention and relegating the would-be intervenors to the status of *amici curiae.* In the first of these cases (*Scofield*), the petitioner, who had been the successful charged party in proceedings before the Board, sought to intervene in review proceedings instituted by the unsuccessful charging party pursuant to §10(f) of the Act. In the second case (*Fafnir*), the petitioner, who had been the successful charging party in proceedings before the Board, sought to intervene in review and enforcement proceedings which were instituted at the petition of the unsuccessful charged party and the cross-petition of the Board. In each case, the Court upheld the right of the successful party to intervene.

> "We hold that both the successful charged party (in *Scofield*) and the successful charging party (in *Fafnir*) have a *right to intervene* in the

> Court of Appeals proceeding which reviews or enforces Labor Board orders. We think that Congress intended to confer intervention rights upon the successful party to the Labor Board proceedings in the court in which the unsuccessful party challenges the Board's decision." (382 U.S. at 208). [Emphasis added].

In *Scofield* and *Fafnir,* the Board argued, as it does in this case, that the relevant provisions of §10 were intended to protect the "public interest" to the exclusion of the "private interests" of the charging party, and that the charging party was intended to be only an incidental beneficiary of any relief obtained by the Board.* Mr. Chief Justice Warren, for a unanimous Court, rejected this argument:

> "In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme. . . . To emphasize the rhetoric of 'public interest' . . . is not to imply that the public right excludes recognition of parochial private interests." (382 U.S. at 218).
>
> ". . .
>
> "In short, we think that the statutory pattern of the Labor Act does not dichotomize 'public' as opposed to 'private' interests. Rather, the two interblend in the intricate statutory scheme." (382 U.S. at 220).

---

*In the proceedings below, Respondent Kennedy invoked this argument as follows: "Section 10(1) of the Act was not intended to establish a remedy for the benefit of a private party, and the incidental benefit which might inure to the charging party from an injunction under the section is not a sufficient basis for permitting charging parties to intervene in the special statutory proceedings contemplated by Section 10(1)." (Answer of appellee Kennedy, before Court of Appeals to Motion by Charging Parties for Leave to Intervene, p. 3).

Here, as in *Scofield* and *Fafnir,* the attempt to deny petitioners' rights of intervention by invoking the "public right" dogma must fail. For, although §10(1) does not address itself directly to the question of whether intervention is allowed in proceedings to review a temporary injunction, the intricate blending of private and public rights in the statutory scheme clearly manifests a congressional intention favoring intervention. The omission of Congress to provide expressly for intervention in an appeal from a §10(1) proceeding cannot be read as an expression of intention to deny charging parties in this case their due process rights to participate actively in litigation involving their statutory rights. This issue was laid to rest in *Scofield* and *Fafnir* when the Court held that Congress's omission to provide expressly for intervention as of right in §10(e) and §10(f) review proceedings did not indicate an intent to bar intervention. (382 U.S. at 209-10).

Congress recognized the irreparable injury which could be caused to an employer by secondary boycott activity, and it was for this reason that §10(l) makes it mandatory for the Board to petition for injunctive relief whenever such illegal activity is alleged and the regional director has "reasonable cause to believe such charge is true." Having thus recognized the essential and immediate need for protecting the interests of the threatened employers in such circumstances, Congress could not simultaneously have intended to prevent full participation in the litigation by the employer. Indeed, the contrary is shown by the language of §10(1) itself, which provides, in relevant part:

> "Upon filing of any such petition the courts shall cause notice thereof to be served upon any

person involved in the charge and such person, *including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony* . . . ." [Emphasis added].

Since this language authorizes the charging party to appear and introduce contentious evidence (*Retail Clerks Union v. Food Employers Council, Inc.*, 351 F.2d 525, 528 (9th Cir. 1965)), the legislative mandate clearly makes the charging party more than an *amicus*, for an *amicus* would have no absolute right to be heard and to introduce and dispute contentious evidence. Were a charging party relegated to the role of an *amicus* in the appeal proceedings, he would be denied the opportunity for active participation in the litigation which Congress intended should be secured to him as a matter of right.

Relegation of a charging party to the status of *amicus* in appeal proceedings would thus be wholly inconsistent with the recognition of private rights which pervades the scheme of the Act. This is made plainly evident by *Fafnir's* rejection of the argument that the would-be intervenor can adequately protect his interests by participating in appeal proceedings as *amicus curiae*. As stated by the Court, in language equally applicable here:

> "The rights typically secured to an intervenor in a reviewing court—to participate in designating the record, to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, to petition for rehearing in the appellate court or to this Court for certiorari—are not productive of delay nor do they cause complications in the appellate courts. . . .

> Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful. . . . On the other hand, an *amicus*—with the exception of the right to file a brief—might be unable adequately to present all the relevant data to the court." (382 U.S. at 215-16).

As noted by the Court, intervention secures for the petitioner, not only the right to participate in the appeal proceedings, but also the right to seek review by writ of certiorari from an adverse decision on the merits in the court of appeals. The need to secure by intervention this right to petition for review is vitally important to the successful charging party, for the Board might decline to petition for review from an adverse decision for reasons wholly unrelated to the merits of the controversy.

> "The Labor Board may . . . adversely affect the rights of the private parties. . . . For example, the Board may decide a case and later re-evaluate its position at a time when that case is before an appellate court. The General Counsel, in such a situation, cannot be expected wholeheartedly to attempt to convince an appellate court of the correctness of a doctrine which the Board itself has abandoned." (382 U.S. at 214-15 n.7).

Intervention additionally "serves the 'public interest' by guaranteeing that the Board's interpretation of the relevant provisions accords with the intent of Congress." (382 U.S. at 219).

Finally, as stressed by the Court in *Fafnir,* the right of intervention by a successful charging party is

supported by the policies underlying intervention generally:

> "[H]elpful analogies may be found in the Judicial Review Act of 1950, governing intervention in the Courts of Appeals by private parties directly affected by agency orders, and in the Federal Rules of Civil Procedure." (382 U.S. at 216-17).
>
> "The Federal Rules of Civil Procedure, of course, apply only in the federal district courts. Still, the policies underlying intervention may be applicable in appellate courts. Under Rule 24(a)(2) or Rule 24(b)(2), we think the charged party would be entitled to intervene." (382 U.S. at 217 n.10).

This was the comment of the Court prior to the 1966 amendment of Rule 24. As now amended to expand the right of intervention, Rule 24(a)(2)* offers an even more compelling analogy in support of petitioners' right to intervene.

Respondents have attempted to distinguish *Scofield* and *Fafnir* by arguing that intervention in appeal proceedings to review a §10(1) injunction is prohibited by the Norris-LaGuardia Act, which limits the jurisdiction of federal courts to grant injunctive relief in labor disputes. This argument wholly fails to take account of §10 (h) of the Act, which excepts from the Norris-La-

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*Rule 24(a)(2), as amended, reads, in material part:

> *"Intervention of Right:* Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Guardia Act *all* federal court proceedings authorized under §10 of the National Labor Relations Act, including not only §10(e) and §10(f) review and enforcement proceedings of the type involved in *Scofield* and *Fafnir,* but also §10(1) injunction proceedings of the type here involved. Section 10(h) provides:

> *"When granting appropriate temporary relief* or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, *as provided in this section [10], the jurisdiction of courts sitting in equity shall not be limited by sections 101-115 of this title."* (29 U.S.C. §160(h)). [Emphasis added].

Ignoring the fact that the exemption provided in §10(h) is applicable to all §10 proceedings, respondents argue that the asserted potential conflict between the Norris-LaGuardia Act and intervention was not involved in *Scofield* and *Fafnir,* where the Court sanctioned intervention in a §10(e) enforcement proceeding. But, in a §10(e) proceeding, a court of appeals decree enforcing a Board cease-and-desist order is an injunctive decree. A cease-and-desist order is not self enforcing. When the Board, as in the *Fafnir* case, issues an order and petitions the court of appeals for enforcement, it seeks injunctive relief—just as it seeks injunctive relief when it petitions a district court pursuant to §10(l). Indeed, the only difference is that the scope of injunctive relief in a §10(e) proceeding is permanent, while being temporary in a §10(1) proceeding. Intervention in an appeal from a §10(1) proceeding involves far less potential conflict with the Norris-LaGuardia Act than the intervention in a §10(e) pro-

ceeding which this Court unequivocally sanctioned in *Scofield* and *Fafnir*.

Thus, *Scofield* and *Fafnir* cannot be distinguished on the grounds that intervention in the §10(e) proceeding there involved did not entail the potential conflict with the Norris-LaGuardia Act which is asserted to bar intervention in this case. Intervention in *Scofield* and *Fafnir* did not conflict with the Norris-LaGuardia Act for the same reasons that intervention in this case does not. Section 10(h), which expressly exempts *all* §10 proceedings from the limitations of the Norris-LaGuardia Act, uniformly applies to a §10(1) proceeding as well as to a §10(e) review proceeding.

Respondents have also argued that the legislative history of §10(1) demonstrates a congressional intent not to allow intervention. This view represents an illogical extension of what was a stated congressional objective—to allow only the Board to *initiate* injunction proceedings. While it is true that Congress did not intend that a charging party have the right to initiate §10(1) proceedings, it is clearly a *non sequitur* to assume from this premise that once a proceedings is instituted by the Board the charging party should be denied intervention. To deny a private party the power to institute a proceeding is manifestly not tantamount to denying him the right to intervene once the Board in its discretion has begun proceedings. Under §10(e), only the Board had statutory authority to file the enforcement petition involved in *Fafnir*. Had the Board not sought enforcement of its order, the successful charging party could not have instituted enforcement proceedings in the court of appeals. But once the Board exercised its discretion to seek enforce-

ment in *Fafnir,* the successful charging party then had a right to intervene—as do petitioners in this case.

In a word, there is "nothing inconsistent in denying the right of a private party to institute" an injunction proceeding "and, on the other hand, in permitting intervention in a proceeding already in the court for decision." (*Local 283, UAW v. Scofield,* 382 U.S. at 221.) Such participation after proceedings have begun in no way impairs the congressional policy of according to the Board exclusive authority to initiate an injunction proceeding.

2. The order of the court below is in conflict with the order of the Court of Appeals for the Second Circuit in *McLeod v. General Elec. Co.,* 366 F.2d 847 (2d Cir., 1966). In *McLeod,* the Board obtained a §10(j) injunction in the district court. The union had been the charging party and participated in the district court proceeding through examination and cross-examination of witnesses, as well as in the making of legal submissions. Although the union was not considered a "party" in the district court proceedings, it was allowed to intervene formally in the appeal proceedings before the Second Circuit.* The contrary

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*Respondents have attempted to discount the significance of *McLeod v. General Electric Co.,* arguing that the matter was not litigated and that, in any event leave to intervene was allowed only as a "nominal party." But the court's order did not refer to the intervenor as a "nominal" party. And while it is not clear whether the matter was litigated, the holding of the Second Circuit clearly gave the charging party "party" status with the right to seek review in this Court. This right was exercised when the union joined with the Board to petition for certiorari. (385 U.S. 533).

Furthermore, it is interesting that the Board through respondent Kennedy attempts to avoid the conflict with *McLeod v. General Electric Co.,* by arguing that there the Board through its regional director McLeod choose not to object to the charging party intervening and appearing as a party and filing a petition for certiorari. One wonders why the Board did not object in that case (if that is the fact) and objects so strenuously in the instant case.

result was reached in the present case after the charging parties had participated in the district court proceedings. Both the order allowing intervention by the Second Circuit and the order denying intervention in the present case were issued without opinion.*

3. The question presented involves an important issue in the administration of the Act. The number of §10(1) injunction proceedings filed in district courts has risen from 44 in fiscal year 1953 to 227 in fiscal year 1965.** In addition, the resolution of the question of the right of a charging party to intervene in the appeal of the issuance of a §10(1) injunction will undoubtedly dispose of the question of the right of a charging party to intervene in the appeal of the issuance of a §10(j) injunction. The number of §10(j) injunction proceedings filed in district courts is also on the rise. There was one such proceeding in fiscal year 1953 and 18 in fiscal year 1965.*** The question presented is therefore not episodic, but is likely to arise with increasing frequency in the courts of appeals and therefore it is in the public interest to resolve it now.

Moreover, the right of a charging employer to intervene in appeal proceedings to review a §10(1) injunction presents a particularly important federal question

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*In *N.L.R.B. v. Nashville Building & Construction Trades Council*, 383 F.2d 562 (6th Cir. 1967), the court had before it both a §10(l) injunction proceeding and an enforcement proceeding under §10(e). Intervention by the successful charging party in the enforcement proceeding was allowed, but the court did not speak to the issue of whether intervention in a §10(1) proceeding was proper. 383 F.2d at 563 n. 1.

**Eighteenth Annual Report of the National Labor Relations Board at 114-17 (1954); Thirtieth Annual Report of the National Labor Relations Board at 214 (1966).

***Ibid.

which should be settled by this Court. Section 10(1) provides that when a complaint alleges an illegal secondary boycott, the Board *must* petition for injunctive relief if the regional director has "reasonable cause to believe such charge is true." This mandatory nature of §10(1) reflects congressional recognition of the need to accord employers immediate injunctive relief from the irreparable injury that results from secondary boycotts:

> "Section 10(1) reflects a congressional determination that the unfair labor practices enumerated therein are so disruptive of labor management relations and threaten such danger of harm to the public that they should be enjoined *whenever a district court has been shown* reasonable cause to believe in their existence and finds that the threatened harm or disruption can best be avoided through an injunction. [citations omitted]. It is not for the Regional Director to substitute his own ideas of how best to deal with alleged unfair labor practices for those of the Congress." (*Retail Clerks Union v. Food Employers Council, Inc.*, 351 F.2d 525, 531 (9th Cir. 1965)).

Congress's firm purpose in enacting §10(1) was to protect employers from the necessity of waiting for a final Board adjudication in cases involving such business-crippling practices as secondary boycotts. In the average case where enforcement of the Board's action is resisted, nearly seventeen months elapse from the date of the violation to the date of the enforcement order.* To deny the initially successful charging em-

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*Subcommittee on Administrative Practice and Procedure, Sen.Comm. on the Judiciary, 86th Cong., 2d Sess., Report on Regulatory Agencies to the President-Elect 64 (1964).

ployer the right to intervene in appeal proceedings in order to protect his interest in continuing such injunctive relief would be egregiously contrary to this congressional purpose.

Petitioners believe that the reasoning and the holding of *Scofield* and *Fafnir* are controlling in this case. However, whatever view is taken on this substantive issue, the question of the application of *Scofield* and *Fafnir* to §10 injunction proceedings should be resolved by this Court. A court of appeals will have to face the issue of intervention by the successful charging party each time review is sought by the unsuccessful charged party in a §10(1) or §10(j) injunctive proceeding. We respectfully submit that a resolution of the charging party's rights is in the public interest and essential to the proper and smooth functioning of federal labor relations law.

CONCLUSION.

For the foregoing reasons, it is urged that this petition for writ of certiorari should be granted.

Respectfully submitted,

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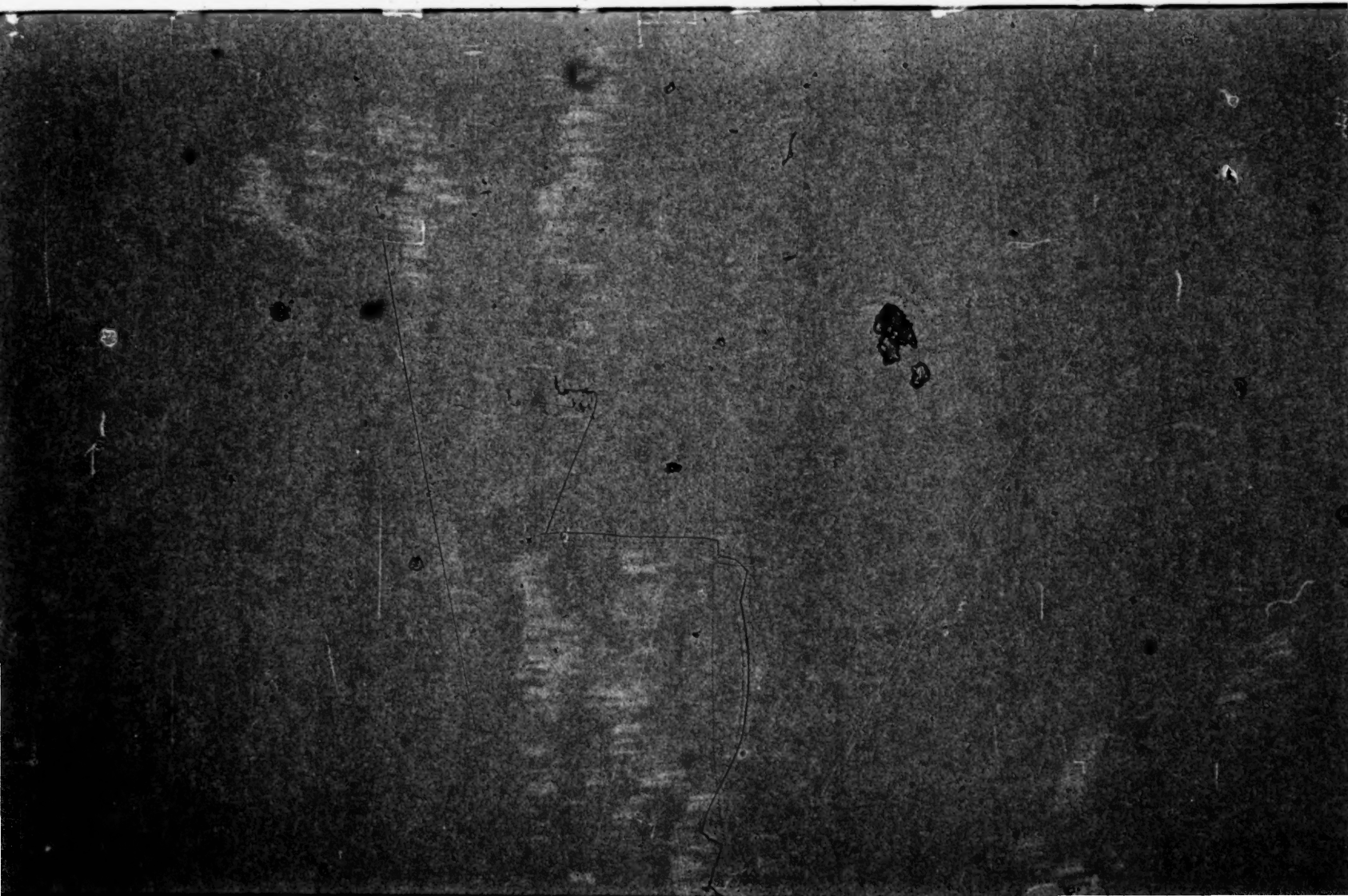
AUGUST, 1968



APPENDIX A.

Order.

United States Court of Appeals, for the Ninth Circuit.

San Francisco-Oakland Newspaper Guild; Newspaper and Periodical Drivers' and Helpers' Union Local 921; Los Angeles Newspaper Guild, Local 69; Los Angeles Web Pressmen's Union No. 18; Los Angeles Stereotypers' Union No. 58; Los Angeles Typographical Union No. 174; International Association of Machinists and Aerospace Workers, District Lodge No. 94; General Warehousemen's Union Local 598; Building Service and Maintenance Employees Union No. 399; Los Angeles Mailers' Union No. 9; and Los Angeles Paper Handlers' Union No. 3, Appellants, vs. Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Appellee. Nos. 22767-8-9.

Filed: May 20, 1968.

Before: KOELSCH, BROWNING and DUNIWAY, Circuit Judges

The Regional Director and charged parties, having moved for reconsideration of our order allowing the charging parties to intervene in this proceeding, the latter were permitted to and did file a brief in opposition and the matter was then submitted.

IT IS ORDERED that the order of April 19, 1968, so far as it permitted such intervention, is rescinded but is deemed an authorization for charging parties to appear and file a brief as amici curiae.

/s/ M. OLIVER KOELSCH
/s/ JAMES R. BROWNING
/s/ BEN C. DUNIWAY
United States Circuit Judges

Order on Motions.

United States Court of Appeals, for the Ninth Circuit.

San Francisco-Oakland Newspaper Guild; Newspaper and Periodical Drivers' and Helpers' Union Local 921; Los Angeles Newspaper Guild, Local 69; Los Angeles Web Pressmen's Union No. 18; Los Angeles Stereotypers' Union No. 58; Los Angeles Typographical Union No. 174; International Association of Machinists and Aerospace Workers, District Lodge No. 94; General Warehousemen's Union Local 598; Building Service and Maintenance Employees' Union No. 399; Los Angeles Mailers' Union No. 9; and Los Angeles Paper Handlers' Union No. 3, Appellants, vs. Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Appellee. Nos. 22767-8-9.

Filed: April 19, 1968.

Before: KOELSCH, BROWNING and DUNIWAY, Circuit Judges

Appellants, above named, have appealed from an order of the United States District Court, granting a temporary injunction on February 7, 1968, in an action brought by the Regional Director of Region 21 of the National Labor Relations Board under Section 10-(L) of the National Labor Relations Act, as amended (29 U.S.C. §160(L)).

Presently they have moved for an order suspending the injunction pending this appeal. By stipulation the parties agreed that the Regional Director should file a written response to said motion by April 17 and that

the matter would then be submitted for the court's determination without argument; additionally, the parties agreed upon a briefing schedule and requested an early hearing of the appeal on the merits.

The charging parties in the Labor Board proceedings (Case Nos. 21-CC-1043 and 21-CC-1043-2) on April 17, filed their motion seeking leave to intervene in this appeal and time to file their opposition to appellants' motion.

The court, after due consideration, makes the following order:

1. The charging parties are granted leave to intervene in this appeal as appellees; their motion for time, etc. is denied;

2. Appellants' motion for stay of the temporary injunction is denied;

3. The briefing schedule is as follows:

Appellants shall file and serve their briefs by April 23; appellees may have seven days after receipt of such briefs to file their briefs, and appellants' reply briefs to follow within five days thereafter.

/s/ M. OLIVER KOELSCH
/s/ JAMES R. BROWNING
/s/ BEN C. DUNIWAY
United States Circuit Judges

APPENDIX B.

Order Granting Temporary Injunction.

United States District Court, Northern District of California.

Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Petitioner, v. San Francisco-Oakland Newspaper Guild; Newspaper and Periodical Drivers' and Helpers' Union Local 921; Los Angeles Newspaper Guild, Local 69; Los Angeles Web Pressmen's Union No. 18; Los Angeles Stereotypers' Union No. 58; Los Angeles Typographical Union No. 174; International Association of Machinists and Aerospace Workers, District Lodge No. 94; General Warehousemen's Union Local 598; Building Service and Maintenance Employees Union No. 399; Los Angeles Mailers' Union No. 9; and Los Angeles Paper Handlers' Union No. 3, Respondents. Civil No. 48511.

This cause came on to be heard upon the verified petition of Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the Board, for a temporary injunction pursuant to Section 10(1) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 160(1)), pending the final disposition of the matters involved pending before said Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in said petition. The Court, upon consideration of the pleadings, affidavits and other evidence, briefs, arguments of counsel, and the entire record in the case, has made and filed its Findings of

Fact and Conclusions of Law, finding and concluding that there is reasonable cause to believe that respondents have engaged in, and are engaging in, acts and conduct in violation of 29 U.S.C. Sec. 158(b)(4)(i)(ii)(B), affecting commerce within the meaning of 29 U.S.C. Sec. 152(6) and (7), and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters involved pending before the National Labor Relations Board, respondents Los Angeles Newspaper Guild, Local 69; Los Angeles Web Pressmen's Union No. 18; Los Angeles Stereotypers' Union No. 58; Los Angeles Typographical Union No. 174; International Association of Machinists and Aerospace Workers, District Lodge No. 94; General Warehousemen's Union Local 598; Building Service and Maintenance Employees Union No. 399; Los Angeles Mailers' Union No. 9; and Los Angeles Paper Handlers' Union No. 3, and each of them, their officers, representatives, agents, servants, employees, attorneys, and all members, persons and labor organizations acting in concert or participation with them, or any of them, be, and they hereby are, enjoined and restrained from:

Engaging in, sanctioning, supporting, promoting, or by picketing, handbilling, orders, instructions, requests or appeals, or by union disciplinary measures, or refusal to refer employees, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, inducing or encouraging any individual employed by the San Francisco Examiner (herein called Examiner), the Chronicle Publishing Company

(herein called Chronicle), the San Francisco Newspaper Printing Company, Inc. (herein called Printing Company), the Hearst Baltimore News American Division, the Hearst Boston Record American-Advertiser Division, the Hearst Capital Newspapers Division, the Hearst San Antonio Light Division, the Hearst Seattle Post-Intelligencer Division, or employed by any other person engaged in commerce or an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services, or in any such or similar manner threatening, coercing or restraining the Printing Company, or the said newspapers, or any of them, or any other person, where in either case an object thereof is: (1) to force or require the Printing Company, or the said newspapers, or any of them, to cease doing business with their customers or suppliers; or (2) to force or require the customers or suppliers of the Printing Company, or the said newspapers, or any of them, to cease doing business with the Printing Company, or the said newspapers, or any of them.

Done at San Francisco, California, this 7th day of February, 1968, at 4:50 p.m.

/s/ Alfonso J. Zirpoli
United States District Judge

Supplemental Order Granting Temporary Injunction.

United States District Court, Northern District of California.

Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Petitioner, v. San Francisco-Oakland Newspaper Guild; Newspaper and Periodical Drivers' and Helpers' Union Local 921; Los Angeles Newspaper Guild, Local 69; Los Angeles Web Pressmen's Union No. 18; Los Angeles Stereotypers' Union No. 58; Los Angeles Typographical Union No. 174; International Association of Machinists and Aerospace Workers, District Lodge No. 94; General Warehousemen's Union Local 598; Building Service and Maintenance Employees Union No. 399; Los Angeles Mailers' Union No. 9; and Los Angeles Paper Handlers' Union No. 3, Respondents. Civil No. 48511.

This cause came on to be heard upon the verified petition of Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the Board, for a temporary injunction pursuant to Section 10(1) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 160(1)), pending the final disposition of the matters involved pending before said Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in said petition. The Court, upon consideration of the pleadings, affidavits and other evidence, briefs, arguments of counsel, and the entire record in the case, has made and filed its Findings of Fact and Conclusions of Law, finding and concluding that

there is reasonable cause to believe that respondents have engaged in, and are engaging in, acts and conduct in violation of 29 U.S.C. Sec. 158(b)(4)(i)(ii)(B), affecting commerce within the meaning of 29 U.S.C. Sec. 152(6) and (7), and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters involved pending before the National Labor Relations Board, respondents San Francisco-Oakland Newspaper Guild and Newspaper and Periodical Drivers' and Helpers' Union Local 921, and each of them, their officers, representatives, agents, servants, employees, attorneys, and all members, persons and labor organizations acting in concert or participation with them, or any of them, be, and they hereby are, enjoined and restrained, in furtherance and support of a labor dispute between two respondents parties hereto and the Herald-Examiner, from:

Engaging in, sanctioning, supporting, promoting, or by picketing, handbilling, orders, instructions, requests or appeals, or by union disciplinary measures, or refusal to refer employees, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, inducing or encouraging any individual employed by the San Francisco Examiner (herein called Examiner), the Chronicle Publishing Company (herein called Chronicle), the San Francisco Newspaper Printing Company, Inc. (herein called Printing Company), the Hearst Baltimore News American Division, the Hearst Boston Record American-Advertiser Division, the Hearst Capital Newspaper Division, the Hearst San

Antonio Light Division, the Hearst Seattle Post-Intelligencer Division, or employed by any other person engaged in commerce or an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services, or in any such or similar manner threatening, coercing or restraining the Printing Company, or the said newspapers, or any of them, or any other person, where in either case an object thereof is: (1) to force or require the Printing Company, or the said newspapers, or any of them, to cease doing business with their customers or suppliers; or (2) to force or require the customers or suppliers of the Printing Company, or the said newspapers, or any of them, to cease doing business with the Printing Company, or the said newspapers, or any of them; provided that nothing in this order shall prevent San Francisco-Oakland Newspaper Guild of Newspaper and Periodical Drivers' and Helpers' Union Local 921 from engaging in or lawfuly supporting any primary labor dispute between the Examiner, Chronicle or the Printing Company and any union representing any employees of said persons.

Done at San Francisco, California, this 8th day of February, 1968, at 9:45 a.m.

/s/ Alfonso J. Zirpoli
United States District Judge

Findings of Fact and Conclusions of Law.

United States District Court, Northern District of California.

Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Petitioner, v. San Francisco-Oakland Newspaper Guild; Newspaper and Periodical Drivers' and Helpers' Union Local 921; Los Angeles Newspaper Guild, Local 69; Los Angeles Web Pressmen's Union No. 18; Los Angeles Stereotypers' Union No. 58; Los Angeles Typographical Union No. 174; International Association of Machinists and Aerospace Workers, District Lodge No. 94; General Warehousemen's Union Local 598; Building Service and Maintenance Employees Union No. 399; Los Angeles Mailers' Union No. 9; and Los Angeles Paper Handlers' Union No. 3, Respondents. Civil No. 48511.

This cause came on to be heard upon the verified petition of Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board (herein called the Board), for a temporary injunction pursuant to Section 10(1) of the National Labor Relations Act, as amended (herein called the Act), pending the final disposition of the matters involved herein pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in the petition. Respondents filed answers to the said petition. A hearing on the issues raised by the petition and answers was duly held on February 7, 1968.

The Court, upon consideration of the pleadings, evidence, briefs, arguments of counsel, and the entire record in the case, makes the following:

Findings of Fact

1. Petitioner is the Regional Director of Region 21 of the Board, an agency of the United States, and filed this petition for and on behalf of the Board.

2. (a) On or about January 6, 1968, the San Francisco Examiner, Division of The Hearst Corporation (herein called Examiner), and the Los Angeles Herald-Examiner, Division of The Hearst Corporation (herein called Herald-Examiner), *inter alias,* filed with the Board a first amended charge to a charge originally filed with the Board on or about January 5, 1968, the said first amended charge alleging that respondents, other than the San Francisco-Oakland Newspaper Guild, have engaged in, and are engaging in, unfair labor practices within the meaning of 29 U.S.C. Sec. 158(b)-(4)(i)(ii)(B).

(b) On or about January 10, 1968, the Herald-Examiner and the Examiner filed with the Board a similar charge alleging that the San Francisco-Oakland Newspaper Guild has engaged in, and is engaging in, unfair labor practices within the meaning of 29 U.S.C. Sec. 158(b)(4)(i)(ii)(B).

3. The aforesaid charges and first amended charge were referred to petitioner as the Regional Director of Region 21 of the Board.

4. There is, and petitioner has, reasonable cause to believe that:

(a) Respondents, each an unincorporated association, are organizations in which employees participate and

which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Respondents maintain their principal offices either in Los Angeles County, California, or in San Francisco, California. At all times material herein, respondents, and each of them, have been engaged within this judicial district in transacting business and in promoting and protecting the interests of their employee members or employee members of constituent or affiliated labor organizations.

(b) The Hearst Corporation (herein called Hearst), a Delaware corporation with its principal office in New York, New York, is engaged in, among other things, the publishing of newspapers and magazines. Hearst maintains seven newspaper divisions: The Baltimore News American Division; The Boston Record American-Advertiser Division; Capital Newspapers Division; The Los Angeles Herald-Examiner Division; The San Antonio Light Division; The San Francisco Examiner Division; and The Seattle Post-Intelligencer Division.

(c) The Herald-Examiner publishes in Los Angeles, California, a daily and a Sunday newspaper in connection with which it subscribes to several interstate news services, has an annual gross volume of business in excess of $1,000,000 and annually purchases goods and materials valued in excess of $100,000 which are shipped to it from points and places located outside the State of California.

(d) The Examiner publishes in San Francisco, California, a daily newspaper, subscribes to several interstate news services, has an annual gross volume of

business in excess of $1,000,000 and annually purchases goods, services and materials valued in excess of $100,000 originating at points and places outside the State of California. The Examiner also, jointly with The Chronicle Publishing Company, publishes a Sunday newspaper.

(e) The Chronicle Publishing Company (herein called Chronicle), a Nevada corporation with offices in San Francisco, California, publishes in San Francisco, California, a daily newspaper known as The San Francisco Chronicle. In connection with its publication of the said newspaper, and jointly with the Examiner in the publication of a Sunday newspaper, Chronicle purchases and receives goods, services, materials and supplies originating outside the State of California valued at a substantial amount and subscribes to interstate news services.

(f) The San Francisco Newspaper Printing Company, Inc. (herein called Printing Company), a Nevada corporation with principal office and place of business in San Francisco, California, is engaged in the business of newspaper printing in connection with which it performs the mechanical, circulation, advertising, accounting, credit, and collection functions for both the Examiner and the Chronicle. In the course and conduct of its printing business, the Printing Company purchases and receives goods, materials and supplies originating outside the State of California valued at a substantial amount.

(g) The Herald-Examiner is, and at all times material herein has been, operated independently of the Examiner the Chronicle and the Printing Company; is and has been operated as a separate autonomous enter-

prise and has and has had separate independent labor relations policies and practices. Neither the day-to-day operations nor the labor relations policies of the Herald-Examiner, the Examiner, the Chronicle or the Printing Company are controlled by Hearst.

(h) At all times material herein, respondents, other than the San Francisco-Oakland Newspaper Guild and Newspaper and Periodical Drivers' and Helpers' Union Local 921, have been engaged in a labor dispute with the Herald-Examiner, and in furtherance and support of such dispute some of such respondents have, since about December 15, 1967, picketed the plant and premises of the Herald-Examiner.

(i) At no time material herein have respondents, or any of them, had a labor dispute with the Examiner, the Chronicle, or the Printing Company, or any other Hearst newspaper other than the dispute of some of the respondents with the Herald-Examiner.

(j) On or about January 5, 1968, in furtherance and support of the aforesaid labor dispute with the Herald-Examiner, respondents, acting jointly and in concert and participation with each other, embarked upon a plan, program and campaign to create a boycott and a work stoppage at the plants and premises of the Examiner, the Chronicle and the Printing Company. Pursuant to the said plan, program and campaign, on or about January 5, 1968, respondents commenced picketing the plants and premises of the Examiner, the Chronicle and the Printing Company, and distributing handbills to employees and the public at the said plants and premises.

(k) In addition to the picketing and handbilling, as set forth in Findings of Fact 4(j), above, and also pur-

suant to the aforesaid plan, program and campaign, respondent San Francisco-Oakland Newspaper Guild orally instructed, directed and appealed to its members employed by the Printing Company to engage in work stoppages and refusals to perform services for their employer.

(l) In addition to the conduct set forth in Findings of Fact 4(j) and 4(k), above, and also pursuant to the aforesaid plan, program and campaign, respondent Newspaper and Periodical Drivers' and Helpers' Union Local 921 instructed its members employed by the Printing Company to engage in a work stoppage, failed and refused to permit them to perform services for their employer, and threatened the Printing Company with continued failure or refusal to permit its members to resume work for the Printing Company.

(m) As a consequence of respondents' acts and conduct set forth in Findings of Fact 4(j), 4(k), and 4(l), above, individuals employed by the Examiner, by the Chronicle, and by the Printing Company engaged in work stoppages and failures to perform services for their employers, and the newspaper publication and printing facilities of the Examiner, the Chronicle, and the Printing Company were completely shut down.

(n) By the acts and conduct set forth in Findings of Fact 4(j), 4(k), 4(l), and 4(m), above, respondents have engaged in, and have induced and encouraged individuals employed by the Examiner, the Chronicle, the Printing Company, and employed by other persons, to engage in, strikes or refusals in the course of their employment to use, manufacture process, transport, or otherwise handle or work on goods, articles, materials or commodities, or to perform services, and have

threatened, coerced or restrained the Examiner, the Chronicle, the Printing Company, and other persons engaged in commerce or in an industry affecting commerce.

(o) Objects of the acts and conduct of respondents, set forth in Findings of Fact 4(j), 4(k), 4(l), 4(m), and 4(n), above, have been, and are: (1) to force or require the Examiner, the Chronicle, or the Printing Company to cease doing business with their customers and suppliers; or (2) to force or require the customers and suppliers of the Examiner, of the Chronicle, or of the Printing Company to cease doing business with the said persons.

5. It may fairly be anticipated that, unless enjoined, respondents will continue to repeat the acts and conduct set forth in Findings of Fact 4(j), 4(k), 4(l), 4(m), 4(n), and 4(o), above, or similar or like acts and conduct in violation of 29 U.S.C. Sec. 158(b)(4)-(i)(ii)(B).

Conclusions of Law

1. This Court has jurisdiction of the parties and of the subject matter of these proceedings, and under 29 U.S.C. Sec. 160(1) is empowered to grant injunctive relief.

2. There is, and petitioner has, reasonable cause to believe that:

(a) Each respondent is a labor organization within the meaning of 29 U.S.C. Secs. 152(2), 158(b), and 160(1).

(b) The Herald-Examiner, the Examiner, the Chronicle, and the Printing Company each is engaged

in commerce within the meaning of 29 U.S.C. Secs. 152(6) and 152(7).

(c) The Herald-Examiner, the Examiner, the Chronicle, and the Printing Company each is engaged in commerce or in an industry affecting commerce.

(d) Respondents have engaged in unfair labor practices within the meaning of 29 U.S.C. Sec. 158(b)(4)-(i)(ii)(B), affecting commerce within the meaning of 29 U.S.C. Secs. 152(6) and 152(7), and a continuation of these practices will impair the policies of the Act as set forth in 29 U.S.C. Sec. 151(b).

3. To preserve the issues for the orderly determination as provided in the Act, it is appropriate, just and proper that, pending the final disposition of the matters herein involved pending before the Board, respondents, their officers, representatives, agents, servants, employees, attorneys, and all members, persons and labor organizations acting in concert or participation with them, or any of them, be enjoined and restrained from the commission, continuation, or repetition of the acts and conduct set forth in Findings of Fact 4(j), 4(k), 4(l), 4(m), 4(n), and 4(o), above, acts and conduct in furtherance and support thereof, or like or related acts or conduct the commission of which in the future is likely or may fairly be anticipated from respondents' acts and conduct in the past.

Done at San Francisco, California, this 7th day of February, 1968.

/s/ Alfonso J. Zirpoli
United States District Judge

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IN THE

Supreme Court of the United States

October Term, 1968
No. 409

LOS ANGELES HERALD EXAMINER, a Division of the Hearst Corporation and THE SAN FRANCISCO EXAMINER, a Division of the Hearst Corporation,

Petitioners,

vs.

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMEN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMEN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS' UNION NO. 9; and LOS ANGELES PAPER HANDLERS' UNION NO. 3, appellants in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondents,

RALPH E. KENNEDY, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, appellee in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondents, San Francisco-Oakland Newspaper Guild, Newspaper and Periodical Drivers' and Helpers' Union Local 921, Los Angeles Newspaper Guild, Local 69, Los Angeles Web Pressmen's Union No. 18, Los Angeles Stereotypers' Union No. 58, Los Angeles Typographical Union No. 174, International Association of Machinists and Aerospace Workers, District Lodge No. 94, General Warehousemen's Union Local 598,

Building Service and Maintenance Employees Union No. 399, Los Angeles Mailers' Union No. 9, and Los Angeles Paper Handlers' Union No. 3, hereinafter referred to as "Respondent Unions", pray that the petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 20, 1968, denying petitioners leave to intervene, be denied.

Question Presented.

Where a district court, in proceedings instituted by the National Labor Relations Board pursuant to § 10 (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 160 (1), issues a temporary injunction against a charged party and the charged party appeals therefrom, does the charging party have a right to intervene in the appeal proceedings?

Statute Involved.

Section 10 (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 160 (1), provides in relevant part:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b) or section 8 (e) or section 8 (b) (7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf

of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *provided, further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. . . . Upon filing of any such petition the court shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony. . . ."

Statement of the Case.

On January 12, 1968 respondent Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, hereinafter referred to as "Respondent Regional Director", filed a petition for injunction under § 10 (1) of the National Labor Relations Act (29 U.S.C. § 160 (1)), in the United States District Court, Northern District of California, alleging

that petitioners herein had filed unfair labor practice charges with the National Labor Relations Board, charging that respondent unions were engaging in activity in violation of § 8 (b) (4) (i) (ii) (B) of the Act (29 U.S.C. § 158 (b) (4) (i) (ii) (B)), and further alleging that respondent Regional Director had reasonable cause to believe that respondent unions had engaged in the unfair labor practices charged. Following the filing of affidavits, the submission of memoranda of points and authorities by petitioners, respondent unions, and respondent Regional Director, and oral argument, the District Court, on February 7, 1968, issued an order granting the temporary injunction requested by respondent Regional Director, and on February 8, 1968, issued a supplemental order granting the temporary injunction requested by respondent Regional Director.

Respondent unions appealed to the Court of Appeals for the Ninth Circuit, seeking a reversal of the judgment of the district court. Petitioners, charging parties below, on April 17, 1968 filed a motion for leave to intervene in the proceedings. By an order dated April 19, 1968, the Court of Appeals granted petitioners leave to intervene in the appeal as appellees. On April 24, 1968, respondent unions and respondent Regional Director filed answers to petitioners' motion for leave to intervene and requests for reconsideration by the Court of Appeals of its order granting intervention. Petitioners were permitted to, and did, file a brief in opposition to the motions for reconsideration of the order granting intervention. On May 20, 1968, the Court of Appeals rescinded its order of April 19, 1968 so far as that order permitted intervention by petitioners, but deemed said order as an authorization for charging parties to appear and file a brief as *amici curiae*.

Reasons for Denying the Petition.

1. The order of the Court of Appeals denying petitioners leave to intervene in the appeal of the District Court's order granting a temporary injunction pursuant to § 10 (1) of the Act is not in conflict with this Court's decision in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 283 v. Scofield,* 382 U.S. 205 (1965).

In *Scofield,* this Court held that charging parties and charged parties in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the court of appeals in proceedings reviewing an NLRB order under § 10 (e) and (f) of the National Labor Relations Act (29 U.S.C. § 160 (e) and (f)). Petitioners contend that the Ninth Circuit's order in this proceeding denying them the right to intervene in an appeal of an order issued by the District Court under § 10 (1) of the National Labor Relations Act is in conflict with this Court's decision in *Scofield,* and attempt to analogize proceedings under § 10 (1) to proceedings under § 10 (e) and (f). This Court, however, in *Scofield,* was careful to confine the scope of its ruling to the question of intervention in the courts of appeals in NLRB review proceedings under § 10 (e) and (f).

> "Lacking a clear directive on the subject, we look to the statutory design of the Act. Cf. *Scripps-Howard Radio v. Commission,* 316 U.S. 4, 11, 62 S. Ct. 875, 86 L. Ed. 1229. Of course, in considering the propriety of intervention in the courts of appeals, our discussion is limited to Labor Board review proceedings. Federal agencies are not fun-

gibles for intervention purposes—Congress has treated the matter with attention to the particular statutory scheme and agency. . . ." (382 U.S. at 210).

In *Scofield* this Court relied heavily upon the statutory scheme of § 10 (e) and (f), a statutory scheme wholly different from that contained in § 10 (1), and upon the fact that § 10 (f), unlike § 10 (1), provides that "any person aggrieved by a final order of the Board . . . may obtain a review of such order. . . ." Thus, this Court said:

> "In some instances, the words of the statute themselves elicit an answer. When the Board enters a final order against the charged party, it is clear that the phrase '[a]ny person aggrieved' in § 10 (f) enables him to seek immediate review in an appropriate Court of Appeals. Alternatively, if the Board determines that a complaint should be dismissed, the charging party has a statutory right to review as a 'person aggrieved'." (382 U.S. at 210).

Moreover, the rationale of this Court in *Scofield* in allowing intervention in review proceedings is wholly inapplicable to proceedings under § 10 (1) of the Act. As this Court pointed out, any party aggrieved by a Board order may seek review of that order and if a successful charging party or charged party is not allowed to intervene in the first appellate review proceeding, there is a possibility of a remand to the Board followed by a ruling against the previously successful party with the attendant possibility of a second appeal to the Court of Appeals by the party who was not per-

mitted to intervene in the original appellate review proceeding. Thus, denying intervention to a successful charging party or charged party in the first appellate review proceeding may lead to undesirable duplication of proceedings and "circuit shopping".

> "To allow intervention to the charged party in the first appellate review proceeding is to avoid 'unnecessary duplication of proceedings,' and to adhere to the goal of obtaining 'a just result with a minimum of technical requirements.' Analysis of the Act's machinery in practice so indicates. A decision of the reviewing court to set aside a Board order dismissing a complaint has the effect of returning the case to the Board for further proceedings. This normally results in the Board's entering an order against the charged party. From this remedial order, as noted, the charged party is aggrieved and may seek review. Judicial time and energy is then expended in pursuit of issues already resolved in the first appeal. Moreover, the second appeal could lead to undesirable 'circuit shopping' and useless proliferation of judicial effort. . . Permitting intervention in the first review thus centralizes the controversy and limits it to a single decision, accelerating final resolution. This is in accord with one of the objectives of the Labor Act—the prompt determination of labor disputes."
>
> *International Union, United Auto Workers v. Scofield,* 382 U.S. 205, 212-213.

And, as this Court noted:

> ". . . In the second review proceeding, if the now-successful charging party is denied interven-

tion and the appellate court takes a different view of the applicable law, the charging party might later have the opportunity to seek review again as a 'person aggrieved'. Thus, three or even more review proceedings could be engendered out of the failure to permit intervention at the most convenient stage—the initial review proceeding. . . ." (382 U.S. at 213, fn 6).

It is clear that the considerations which warrant intervention in review proceedings under § 10 (e) and (f) do not exist in proceedings under § 10 (1). Under § 10 (1) there is no possibility of duplication of proceedings which might result from the denial of intervention. If the charging parties are not permitted to intervene in the proceedings in a § 10 (1) appeal, and if there is a remand to the District Court with a subsequent ruling in favor of appellants, charging parties will not have the opportunity to review this ruling in a subsequent appeal, as would be the case under § 10 (e) and (f). The problem considered by this Court in *Scofield* was that charged parties and charging parties who were not allowed to intervene in the first appellate proceeding might subsequently be able to seek review themselves and thus relitigate the case. Under § 10 (1) a charging party who is not allowed to intervene could never subsequently have a right to bring an appeal himself and thus the case would not, and could not, be relitigated in a second appeal based on the same issues.

In short, the question of intervention in proceedings on a § 10 (1) appeal is an entirely different question from that considered by this Court in *Scofield* with respect to intervention in review and enforcement pro-

ceedings under § 10 (e) and (f). Thus, the order of the Court of Appeals denying intervention in the instant proceeding is not in conflict with this Court's decision in *Scofield*.

2. The order of the court below is consistent with the letter and spirit of § 10 (1) and with the intent of Congress in the Norris-LaGuardia Act and the National Labor Relations Act, and permits charging parties to participate in the § 10 (1) proceeding to the full extent intended by Congress.

In §§ 10 (j) and 10 (1) of the Act, Congress enacted a narrow exception to the prohibitions of the Norris-LaGuardia Act (29 U.S.C. § 101, *et seq.*), against temporary injunctive relief in labor disputes. This narrow exception was applicable only to proceedings by the administrative agency entrusted with the enforcement of the Act, the National Labor Relations Board.

As the Fourth Circuit pointed out prior to the passage of the Taft-Hartley amendments to the National Labor Relations Act:

> "Prior to the passage of the Norris-LaGuardia Act of March 23, 1932, 47 Stat. 70, 29 U.S.C.A. §101, et seq., the use of injunctions in labor disputes had been the subject of much bitter controversy; and the purpose and effect of that legislation was to deprive the federal courts of jurisdiction to interfere by injunction with labor disputes except in a very limited class of cases. The jurisdiction of the court over labor disputes was still further limited by the National Labor Relations Act of July 5, 1935, 49 Stat. 449, 29 U.S.C.A.

§151 et seq., which guaranteed the right of collective bargaining to employees engaged in industry affecting interstate commerce, defined unfair labor practices on the part of employers and set up the National Labor Relations Board to supervise collective bargaining and protect employees in the exercise of rights guaranteed by the Act from unfair labor practices on the part of their employers. It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that Act was 'to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining'; that the only rights made enforceable by the Act were those determined by the National Labor Relations Board to exist under the facts of each case; and the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined."

Amazon Cotton Mill Co. v. Textile Workers Union, 167 F. 2d 183, 186 (4th Cir. 1948).

In *Bakery Sales Drivers Local Union No. 33 v. Wagshal,* 333 U.S. 437 (1948), this Court held that the Labor Management Relations Act of 1947 had removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, "only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party." (333 U.S. at 442).

As this Court said in *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 452, 517 (1955):

> "Congress explicitly gave such jurisdiction [to issue injunctions against unfair labor practices pending final adjudication by the Board] to the district courts only on behalf of the Board on a petition by it or 'the officer or regional attorney to whom the matter might be referred'. . . To hold that the Taft-Hartley Act also authorizes a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify."

Petitioners argue that § 10 (h) of the Act excepts all proceedings under § 10 from the provisions of the Norris-LaGuardia Act, and attempt to analogize the order of the Court of Appeals in enforcement proceedings with the temporary injunctive relief envisaged under § 10 (1). It is clear, however, that in § 10 of the National Labor Relations Act Congress carved out certain express exceptions to the provisions of Norris-LaGuardia. As the Fourth Circuit said in *Amazon Cotton Mill, supra,* quoting with approval the language of this Court in *General Committee v. Missouri K.T.R. Co.*, 320 U.S. 323, 332 (1943), and applying it to the National Labor Relations Act:

> "On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal ma-

chinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." (167 F. 2d at 186).

Clearly, the statutory scheme of § 10 (1) sets forth wholly different procedural rules from those established with respect to proceedings before the Board and subsequent review or enforcement proceedings. Section 10 (1) provides that the charging party shall be given an opportunity to appear by counsel and present any relevant testimony in the proceedings for a temporary injunction. It does not provide that the charging party may intervene in such proceedings or that he may become a party to the proceedings. Nor does it provide that the charging party, or any other person aggrieved by an order of the district court, may seek review of that order. Section 10 (f), however, provides that any person aggrieved by a final order of the Board may seek review in a Court of Appeal. Moreover, as this Court pointed out in *Scofield,* the charging party in the Board proceeding is accorded formal recognition; he participates in the hearing as a "party" and he may file exceptions to any order of the trial examiner. If Congress had intended that charging parties should have the right to intervene in § 10 (1) proceedings or in § 10 (1) appeals, it could have so provided. With respect to proceedings before the Board, Congress provided in § 10 (b), "In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony." With re-

spect to review proceedings, as we have seen, Congress provided that any person aggrieved might seek review.

It was not by accident that Congress provided for varying degrees of participation on the part of charging parties in proceedings under § 10 of the Act. Although petitioners attempt to analogize the temporary injunction envisaged under § 10 (1) with the injunction issued by a court of appeals in enforcement proceedings, the injunctions are in fact wholly different and there are compelling reasons for providing for different degrees of participation by private litigants. The injunction contemplated under § 10 (e) of the Act follows a full hearing on the merits before the Board with all parties participating. In a § 10 (e) and (f) proceeding the findings of the Board must be supported by substantial evidence on the record considered as a whole. Section 10 (1) provides for interim relief, a temporary restraining order and/or a preliminary injunction after a preliminary investigation by the Board but prior to any hearing on the merits. The petitioning Regional Director under § 10 (1) must show only that there is reasonable cause to believe that a violation of the Act has occurred.

As Chief Justice Warren said in a dissenting opinion, joined by Justice Brennan and Justice Fortas, in *Walker v. City of Birmingham,* 388 U.S. 307, 330 to 331 (1967):

> "The *ex parte* temporary injunction has a long and odious history in this country, and its susceptibility to misuse is all too apparent. . . . As a weapon against strikes, it proved so effective in the hands of judges friendly to employers that Congress was forced to take the drastic step of

removing from federal district courts the jurisdiction to issue injunctions in labor disputes. The labor injunction fell into disrepute largely because it was abused. . . ."

Congress was fully aware of the "odious history" of the temporary injunction when it enacted § 10 (1). Thus, in providing for a temporary injunction with respect to certain alleged unfair labor practices prior to any hearing on the merits, Congress carefully restricted the conditions upon which an ex parte temporary restraining order could be issued and also expressly limited the rights of private litigants in the proceeding.

The "odious history" surrounding the temporary injunction granted prior to a hearing on the merits does not exist with respect to the type of injunction contemplated by § 10 (e), *i.e.*, a permanent injunction after full adjudication and full hearing on the merits of the dispute. Accordingly, the procedures and the rights of private parties under § 10 (1) are vastly different from those under § 10 (e) and (f).

To allow the charging party to intervene in a proceeding under § 10 (1) and become a full party in such a proceeding violates both the letter and the spirit of § 10 (1) and the intent of Congress in the Norris-La Guardia Act and the National Labor Relations Act. Congress has sought to preclude private parties from obtaining temporary injunctive relief in labor disputes and has entrusted only the Board with the authority to secure such interim relief where the Board has reasonable cause to believe that an unfair labor practice has occurred.

The right to intervene and become a full party in these proceedings carries with it many rights which Congress did not intend private litigants to have. Thus, if charging parties can intervene in the appeal, they would undoubtedly seek to intervene in the district court proceeding. Affording the charging parties the right to intervene and all of the rights of a party to the proceeding necessarily raises questions as to their right to appeal and as to their right to initiate contempt proceedings. It certainly was not the intent of Congress to allow a private litigant to appeal and seek an injunction from a higher court which it could not have sought nor obtained from the lower court. Nor could it have been the intent of Congress to entrust a private litigant with the right to initiate contempt proceedings based on violation of an injunction which it was legally proscribed from obtaining originally. Nor was it the intent of Congress to permit a charging party to dictate the course of litigation in § 10 (1) proceedings.

The decision of the Ninth Circuit denying petitioners the right to intervene in this proceeding properly limits the participation of private litigants in § 10 (1) proceedings to the extent intended and expressly provided for by Congress in § 10 (1); and it is consistent with the intent of Congress in the Norris-La Guardia Act and the National Labor Relations Act to severely restrict the use of the temporary injunction in labor disputes and to prevent private parties from either obtaining such injunctions or from dictating the course of litigation with respect to such injunctions.

3. The order of the court below is not in conflict with the decisions of other courts of appeal.

Petitioners contend that the order of the Ninth Circuit denying intervention herein is in conflict with the order of the Court of Appeals for the Second Circuit in *McLeod v. General Electric Co.*, 366 F. 2d 847 (2d Cir. 1966). However, there is neither a holding nor a discussion of the issue of intervention by the Second Circuit in *McLeod*. It is not clear whether the charging parties' intervention in that case was opposed nor whether the issue was litigated. It also appears that the question of intervention was not subsequently litigated on the petitions for writ of certiorari in the Supreme Court, 385 U.S. 533 (1967).

Moreover, the Second Circuit has previously considered the role of a charging party in a § 10 (1) proceeding, and like the Ninth Circuit, has held that the charging parties' role is a limited one. Thus, in *McLeod v. Business Machine and Office Appliance Mechanics Conference Board*, 300 F. 2d 237 (2d Cir. 1962), the Second Circuit rejected an argument raised by the charging party in a § 10 (1) proceeding, since the Regional Director had not relied upon this and had not alleged it. The Court analyzed in detail the rights of a charging party in proceedings under § 10 (1) and said:

> "The charging party, Rand, contends that handbills distributed are untruthful and, therefore, not protected by the 'publicity proviso.' Because the Regional Director has not relied upon this in his petition or argument, we believe the question governed not by section 10 (1), but by the Norris-LaGuardia Act. We lack jurisdiction, therefore, to

> grant relief. Section 10 (1) is operative only upon the filing of a petition by a Regional Director of the Board. This limitation was imposed in order to restrict the potential involvement of federal courts in labor disputes. . . . We are mindful of the fact the statute allows the charging party to appear by counsel and to present relevant testimony. We believe, however, the principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant." (300 F. 2d at 242-243).

NLRB v. Nashville Building & Construction Trades Council, 383 F. 2d 562 (6th Cir. 1967), also cited by the petitioners, involved three legal proceedings, all of which were before the Sixth Circuit. The three proceedings were an appeal of a temporary injunction granted by the district court under § 10 (1), a petition for writ of mandamus filed by the respondent union, and a petition for enforcement of the final NLRB order on the merits. The question of intervention in the § 10 (1) appeal was not decided or discussed by the Sixth Circuit. Although three proceedings were before the Sixth Circuit, that court noted at page 563, footnote 1, that the petition of the charging party to intervene in the enforcement proceedings was granted. The charging party did not intervene in the appeal of the injunction issued under § 10 (1) even though that proceeding was also before the court, and the Sixth Circuit was careful to specify that the charging party was intervening in the enforcement proceeding, citing *UAW v. Scofield, supra.*

Thus, there is certainly no clear conflict among the courts of appeal. The views of the Second and Sixth Circuits on this issue have not been expressed by those courts and are certainly not clearly defined; both courts have indicated that a charging party's role in § 10 (1) proceedings is a limited one. In any event, this question is not ripe for consideration by this Court in view of the lack of any clear expression of the view of other courts of appeal.

4. The question presented does not involve an important issue which this Court should decide. While petitioners correctly point out that 227 § 10 (1) injunction proceedings were filed in the district courts in fiscal 1965, it is important to note that of this number, together with 13 cases pending at the beginning of the year, 73 cases were settled, eight dismissed, 48 continued in an inactive status, 16 withdrawn, and nine were pending court action at the close of the year. Only 86 petitions went to final order in fiscal 1965.* Similarly, of the 18 petitions for temporary relief under § 10 (j) filed in fiscal 1965, only 13 went to final order in the district court.**

Undoubtedly, only a small percentage of these cases were appealed, and although petitioners contend that a court of appeals will have to face the issue of intervention each time an appeal is taken, it is far more likely that many charging parties will not seek to intervene in the proceedings. Thus, the question presented herein

*Thirtieth Annual Report of the National Labor Relations Board, at 146 (1966).

**Id., at 143.

will not arise with nearly the frequency suggested by petitioners, and, in fact, would more likely arise only infrequently.

Respondent unions respectfully submit that this petition does not present a particularly important federal question which should be settled by this Court and that the question presented is neither ripe for consideration at this time nor of sufficient import to warrant this Court's consideration.

Conclusion.

For the foregoing reasons, it is respectfully urged that the petition for writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 409

LOS ANGELES HERALD EXAMINER, A DIVISION OF THE HEARST CORPORATION, ET AL., PETITIONERS

v.

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD, ET AL., AND RALPH E. KENNEDY, REGIONAL DIRECTOR OF REGION 21 OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE REGIONAL DIRECTOR IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion in denying intervention. The order, findings of fact, and conclusions of law of the district court in the underlying injunction suit (Pet. App. 4–17) are not officially reported.

319-698—68

JURISDICTION

The order denying intervention (Pet. App. 1) was entered on May 20, 1968. The petition for a writ of certiorari was filed on August 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the party who filed an unfair labor practice charge with the National Labor Relations Board is entitled to intervene as of right in the respondent's appeal from a temporary injunction issued by the district court under Section 10(l) of the National Labor Relations Act.

STATUTE INVOLVED

Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)), is set forth in the petition at p. 3.

STATEMENT

Upon the filing of a charge by petitioners that respondent unions were engaging in a secondary boycott in violation of Section 8(b)(4)(B) of the National Labor Relations Act (29 U.S.C. 158(b)(4)(B)), respondent Kennedy, the Regional Director of the National Labor Relations Board, petitioned the United States District Court for the Northern District of California, pursuant to Section 10(l) for a temporary injunction. After a hearing,[1] the district

[1] The case was decided on the basis of the pleadings, the affidavits submitted by the Regional Director and the unions, the briefs of the parties, and the argument of counsel (Pet. App. 4).

court found reasonable cause to believe that the unions were engaging in such illegal conduct, and enjoined them from it pending a final determination of the matter by the Board (Pet. App. 4–17). When the unions appealed from the temporary injunction, petitioners sought to intervene in the court of appeals. That court initially granted intervention (Pet. App. 2–3), but, upon consideration of the opposition filed by the Regional Director and the unions, it rescinded that order and authorized petitioners "to appear and file a brief as amici curiae" (Pet. App. 1).

ARGUMENT

The action of the court below in denying intervention as of right to the charging party in an appeal taken from a temporary injunction issued under Section 10(l) of the Act is correct, and is not in conflict with *Local 238, U.A.W.* v. *Scofield*, 382 U.S. 205.

In *Scofield*, the Court held that, where the Board has entered an order at the culmination of unfair labor practice proceedings under Section 10(c) of the Act (29 U.S.C. 160(c)),[2] either the successful charging party (where the Board finds a violation of the Act (*Fafnir*)), or the successful respondent (where the Board dismisses the complaint (*Scofield*)) has the right to intervene in proceedings brought in the court of appeals to review the Board's order. The present case involves a different situation, in which

[2] The Court issued one opinion covering two cases—*Scofield* (which involved the successful respondent), and *Fafnir* (which involved the successful charging party).

the considerations that led the Court to permit intervention in *Fafnir* are not present.

The legislative history of Section 10(l) shows that Congress rejected proposals which would have empowered private parties to seek injunctive relief against secondary boycotts because of concern that such authority would revive the abuses which the Norris-LaGuardia Act (29 U.S.C. 101, *et seq.*) was intended to correct; instead, Congress relaxed the Norris-LaGuardia Act restrictions only in suits brought by the Board.[3] Unlike the administrative proceedings before the Board, where the person filing a charge participates as a "party" pursuant to agency regulations (see *Fafnir*, 382 U.S. at 219), Congress provided a more limited role for the charging party in Section 10(l). It is given notice of the filing of the injunction petition and "an opportunity to appear by counsel and present any relevant testimony." It does not become a party to the litigation, however, and thus may not enlarge the issues presented or the relief sought by the Regional Director, institute contempt proceedings, or appeal if the district court denies the injunction.[4] Petitioners furnish

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[3] See *Building & Constr. Trades Council* v. *Alpert*, 302 F. 2d 594, 597–598 (C.A. 1); *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C.A. 4); *Bakery Sales Drivers Union* v. *Wagshal*, 333 U.S. 437, 442; *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 204.

[4] See *McLeod* v. *Business Machine and Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 242–243 (C.A. 2); *Phillips* v. *United Mine Workers*, 218 F. Supp. 103 (E.D. Tenn.); cf. *Retail Clerks Union* v. *Food Employers Council*, 351 F. 2d 525 (C.A. 9).

no evidence that Congress intended the charging party to have greater rights in the court of appeals than it had in the district court.

Moreover, *Fafnir* involved a review of a final Board order, entered after full administrative proceedings, directing the respondent to cease and desist from an unfair labor practice. Sanctions could not be imposed for the violation of that order unless it was enforced by the appellate court. If the charging party were denied the right to participate fully at the appellate level, it might be deprived of the permanent relief which it sought and obtained through the administrative proceedings without having had an adequate opportunity to present its views. A temporary injunction under Section 10(l), on the other hand, is effective only during the pendency of the administrative proceedings; it is entered in an expedited proceeding (in the present case, the issue was submitted to the district court entirely on affidavits); and violation of the order is punishable as contempt. The injunction does not purport to be a final adjudication of the parties' rights under the Act, nor does appellate review, unlike the situation in *Fafnir*, involve direct review of the Board's action.

In view of the particular character of the injunctive remedy, and the fact that it may be obtained only at the instance of the Regional Director in judicial proceedings initiated and managed by him, we submit that Congress did not intend to permit the charging party to exercise the control over an appellate proceeding that would result if it had the right to intervene in the court of appeals in every such case.

Rather, we believe that the statutory scheme contemplates that the court of appeals may, as it did here, limit the charging party to participation as *amicus curiae*.[5] Private interests relevant to such proceedings may thereby be adequately presented.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition should be denied.

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SEPTEMBER 1968.

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[5] In *McLeod* v. *General Electric Co.*, 366 F. 2d 847 (C.A. 2), vacated and remanded on other grounds, 385 U.S. 533, cited by petitioners (Pet. 13), the charging party was permitted to intervene in an appeal from a temporary injunction issued under Section 10(j) (29 U.S.C. 160(j)). It does not appear, however, that the issue was ever litigated in that case.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 409

LOS ANGELES HERALD EXAMINER, a Division of The Hearst Corporation, and THE SAN FRANCISCO EXAMINER, a Division of The Hearst Corporation, *Petitioners,*

vs.

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMEN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMEN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS' UNION NO. 9; and LOS ANGELES PAPER HANDLERS' UNION NO. 3, appellants in proceedings before the United States Court of Appeals for the Ninth Circuit, *Respondents,*

RALPH E. KENNEDY, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, appellee in proceedings before the United States Court of Appeals for the Ninth Circuit, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1968

No. 409

LOS ANGELES HERALD EXAMINER, a Division of The Hearst Corporation, and THE SAN FRANCISCO EXAMINER, a Division of The Hearst Corporation,

Petitioners,

vs.

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMEN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMEN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS' UNION NO. 9; and LOS ANGELES PAPER HANDLERS' UNION NO. 3, appellants in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondents,

RALPH E. KENNEDY, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, appellee in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

1. In their Brief in Opposition to Petition for a Writ of Certiorari, respondent unions assert that this Court in *Local 283, UAW v. Scofield*, 382 U.S. 205 (1965) expressly confined the scope of its ruling to the question of intervention in review proceedings under § 10(e) and (f) of the National Labor Relations Act.[1] But the language of *Scofield* plainly shows that the Court was not limiting the rationale of its opinion to review proceedings under § 10(e) and (f) as distinct from review proceedings under other subdivisions of Section 10 of the Act. The Court stated:

> "The Labor Act does . . . not provide explicitly for intervention at the appellate court level. . . . Similarly, no specific standards govern the propriety of intervention in Labor Board review proceedings. . . .
>
> "Lacking a clear directive on the subject, we look to the statutory design of the Act. [Citation omitted]. Of course, in considering the propriety of intervention in the courts of appeals, our discussion is limited to Labor Board review proceedings. *Federal agencies are not fungibles* for intervention purposes — Congress has treated the matter with attention to the *particular statutory scheme and agency*." (382 U.S. at 209-210). [Emphasis added].

Obviously the court was merely disclaiming any applicability of its opinion to review proceedings involving

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[1] Respondent Unions' Brief in Opposition, p. 5.

agencies and statutory schemes other than the Board and the National Labor Relations Act.

Moreover, the Court's opinion in *Local 133, UAW v. Fafnir Bearing Co.*, the second of the two cases consolidated for determination in *Scofield*, did not rely upon the statutory scheme of § 10(e) and (f) to the exclusion of the other sections of the Act. The Court looked to the "statutory machinery" of the Act generally, observed that "the Labor Act recognizes the existence of private rights within the statutory scheme" (382 U.S. at 218), and concluded that the "statutory pattern of the Labor Act does not dichotomize 'public' as opposed to 'private' interests." (382 U.S. at 220). There is thus no basis for asserting that the holding in *Fafnir* is based upon a narrow premise confined to the scheme of § 10(e) and § 10(f) of the Act.

2. Respondents have also contended that the Court's decision in *Scofield* was dictated by a need to avoid the duplication in appellate proceedings and possible "circuit shopping" that would occur were intervention in § 10(e) and § 10(f) proceedings denied. Respondents then argue that a denial of intervention in a § 10(1) appeal would not give rise to a similar risk of duplication in appellate proceedings.[2] This argument wholly fails to take into account the factual distinction between the two separate and distinct cases which were consolidated for hearing and determination in *Scofield*.

The first case, *Local 283, UAW v. Scofield*, was on a writ of certiorari to the Seventh Circuit and involved

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[2] Respondent Unions' Brief in Opposition, pp. 6-8.

the question of whether a charged party who had been successful in proceedings before the Board could intervene in a § 10(f) review proceeding initiated by the unsuccessful charging party. The second case, *Local 133, UAW v. Fafnir Bearing Co.*, was on a writ of certiorari to the Second Circuit and involved the question of whether a successful charging party could intervene in § 10(e) enforcement and § 10(f) review proceedings. In the first case the Court did emphasize that if a successful charged party were not allowed to intervene in § 10(f) review proceedings, such proceedings might eventually result in a reversal and remand to the Board for the issuance of an order, in which case the charged party would then be entitled, as a party "aggrieved", to relitigate in a subsequent appeal the same questions litigated in the first appeal. This consideration, however, was demonstrably not material to the Court's decision in *Fafnir*, which involved, as here, the intervention rights of a successful "charging party". As stated by the Court:

> "The problem of whether intervention should be granted to the successful charging party to the Labor Board proceedings presents considerations somewhat distinct from the case of the intervening charged party. Resolution of the problem is no easy matter, and it is understandable that the courts have divided on the issue." (382 U.S. at 217).

One of the distinctions which the Court may have had in mind is that denial of intervention to a successful charging party does not involve the risk of duplicating

appellate proceedings which would be encountered in denying intervention to a successful charged party. In the former case the risk is great; in the latter case, as in *Fafnir*, the risk is remote. When a court of appeals reverses a Board decision which had been in the charging party's favor, rarely is the case remanded to the Board for entering of an order from which the charging party would be entitled to appeal as a "party aggrieved" under § 10(f). For example, in the fiscal year 1965, there were 197 decisions rendered by the courts of appeals involving cases where the charging party had been successful before the Board. Of these, the courts finally disposed of 192, or 97 percent, without the necessity of a remand to the Board.[3] Of the three percent of the cases remanded to the Board, it is very probable that the Board affirmed its prior decision in a substantial proportion of such cases, thus further reducing the percentage of cases where the charging party could bring a second appeal as a "party aggrieved". Thus, it is apparent that in cases involving a successful charging party, the avoidance of duplicity of appellate proceedings could not be, and in *Fafnir* was not, the basis for granting intervention. Indeed, the Court's opinion in *Fafnir* did not even advert to the subject of avoiding duplication of appeals other than to mention cursorily in a final footnote that disallowance of intervention by the charging party "could lead to duplicity in appellate review." (382 U.S. at 222 n. 20).

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[3] Thirtieth Annual Report of the National Labor Relations Board at 212.

However, it should be noted that permitting the successful party to intervene in § 10(1) appeals could prevent duplicity in appellate proceedings and the possible "circuit shopping" resulting therefrom. This would occur, for example, where the reviewing court in a § 10(1) appeal reverses the district court, holding on purely legal grounds and undisputed facts that there is no reasonable cause to believe the charge is true since the matter in controversy does not satisfy the Act's jurisdictional requirement of involvement in interstate commerce. If the Board subsequently dismissed the complaint on the same grounds, the charging party would be an aggrieved party entitled under § 10(f) to petition for review in the Court of Appeals for the District of Columbia, and this would enable him, if he had not been permitted to intervene in the § 10(1) appeal, to relitigate the very issue which had been adjudicated in the previous appeal. On the other hand, if the charging party had been allowed to intervene in the § 10(1) appeal, that court's jurisdictional finding, based upon purely legal grounds and undisputed facts, would be the law of the case and would be binding upon the charging party were he to attempt an appeal from the subsequent adverse decision by the Board.

Ultimately, however, to focus upon the incidental effect of avoiding duplicity in appeal proceedings is to ignore the reasons for intervention which were stressed by the Court in *Fafnir*. The Court in *Fafnir* emphasized two considerations: The interblending of private and public rights in the "intricate statutory scheme" (382 U.S. at 220) and the capriciousness that would result

in "refusing to afford the successful party . . . an opportunity tantamount to that of the unsuccessful party in persuading an appellate court." (382 U.S. at 222). These considerations, and those which the Court discussed in *Scofield,* apply with equal force in support of the right of a successful charging party to intervene in § 10(1) appeals.

3. Respondents have attempted, finally, to challenge petitioners' right to appellate intervention by obliquely raising issues which are not before the Court — the questions of whether charging parties may intervene at the district court level of § 10(1) proceedings and whether they may institute contempt proceedings. Respondent Kennedy states, without any citation of authority, that the charging party does not become a party to the district court proceedings and that he therefore could not be presumed to have greater rights on appeal.[4] The respondent unions argue that if the successful charging party can intervene in § 10(1) appeals, he could also possibly intervene in the district court proceedings, appeal therefrom, and initiate contempt proceedings.[5]

Aside from obscuring the issue before the Court, these arguments rest upon three unfounded assumptions: (1) that intervention at the district court level is barred by the

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[4]As of the time of printing the instant Reply Brief, petitioners have not received a copy of Respondent Kennedy's Brief in Opposition. The above argument was made, however, by Kennedy in his opposition to petitioners' application for stay of proceedings in the Ninth Circuit.

[5]Respondent Unions' Brief in Opposition, p. 15.

Act; (2) that intervenors would have standing to institute contempt proceedings; and (3) that the right of appellate intervention necessarily presupposes recognition of a right for the charging party to participate in the district court proceedings as a formal party.

Contrary to the first assumption, the courts have held that charging parties are entitled to intervene as a matter of right in § 10(1) district court proceedings. *Penello v. Plumbers Union,* 41 LRRM 2269 (E.D. Va. 1957); *Davis v. Hotel & Restaurant Employees & Bartenders Intl. Union, Local 246,* No. 66-68 (D.C. Okla. 1966) (unreported); *Kennedy v. Retail Clerks Union, Local 137,* No. 65-34-S (S.D. Cal. 1965) (unreported).[6] In *Plumbers Union,* the court stated:

> "The court is of the opinion that the Council [the charging party] is entitled to intervene and be made a party to the action. *Section 10(1) of the Act plainly authorizes participation by the charging*

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[6]Both *Davis* and *Retail Clerks Union* are discussed in Thirty-first Annual Report of the National Labor Relations Board at 155-56 (1967). In *Retail Clerks Union,* the district court permitted the charging parties to intervene in § 10(1) proceedings. Thereafter, the district court issued a temporary injunction over the objection of the Regional Director who had entered into a stipulation with the charged union, providing for a lesser form of relief. On appeal, the Ninth Circuit affirmed the district court's power to grant relief not sought by the Regional Director and held that the district court did not "err in permitting the charging parties to appear and present evidence in support of the injunction." *Retail Clerks Union v. Food Employers Council, Inc.,* 351 F.2d 525, 528 (9 Cir. 1965). But notwithstanding the fact that the charging parties had properly been permitted to intervene in the district court proceedings, the court denied them leave to intervene in the appeal proceedings.

> *party. Intervention is necessary to implement this right.* Mine Workers v. Eagle Picher, 1945, 325 U.S. 335, 338, 16 LRRM 689; Edison Co. v. Labor Board, 1938, 305 U.S. 197, 218, 3 LRRM 645. However, the intervenor alone has no standing to ask for an injunction or other relief." (41 LRRM at 2271). [Emphasis added].

As the court noted, § 10(1) unequivocally requires that charging parties be permitted to participate fully in the district court proceedings. In the words of the Act, "the charging party . . . *shall* be given an opportunity to appear by counsel and present any relevant testimony."[7] Unlike § 10(b), which makes participation in Board proceedings depend upon "the discretion of the . . . Board," § 10(1)'s mandatory language expresses a clear congressional intention favoring intervention. Thus, if it be assumed that the right of appellate intervention depends upon the would-be intervenor's rights of participation in the precedent trial or hearing proceedings, § 10(1) presents a much stronger case for appellate intervention than does § 10(e) and § 10(f).

As for the second assumption, the Court in *Scofield* laid this issue to rest when it pointed out that there is "nothing inconsistent in denying the right of a private party to institute a contempt proceeding . . . and, on the other hand, in permitting intervention in a proceeding already in the court for decision." (382 U.S. at 221). In *Davis, supra,* the court relied on *Scofield* in holding that a charging party who has been allowed to intervene

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[7]Emphasis added.

in a § 10(1) proceeding does not have standing to institute proceedings for a § 10(1) injunction.

Finally, contrary to the third assumption, the right of intervention in § 10(1) appeals clearly does not presuppose a right of intervention in § 10(1) district court proceedings. As the court in *Scofield* stated, "the considerations involved in determining whether the charging party has certain rights before the Board are not dispositive of the question of appellate intervention." (382 U.S. 219 n. 15). Similarly, the question of intervention in § 10(1) appeals is not dispositive of, nor controlled by, the issue of intervention at the district court level.

In sum, the question of the right of charging parties to intervene in § 10(1) district court proceedings is not before this Court and need not be decided by it. And to the extent that that issue might be relevant by way of analogy, the cases upholding the right of charging parties to intervene in § 10(1) district court proceedings provide the clincher in support of petitioners' right to intervene in the appeals proceedings in the court below.

CONCLUSION

For the aforementioned reasons, as well as those stated in the Petition for a Writ of Certiorari, petitioners pray that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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